

OPPENHEIMER

OPPENHEIMER WOLFF & DONNELLY LLP

1350 Eye Street N.W., Suite 200
Washington, D.C. 20005-3324

202.312.8000
Fax 202.312.8100

Direct Dial: 202.312.8209
E-Mail: EFishman@oppenheimer.com

200 472

Amsterdam	New York
Brussels	Orange County
Chicago	Paris
Geneva	Saint Paul
Los Angeles	Silicon Valley
Minneapolis	Washington, D.C.

www.oppenheimer.com

November 17, 2000

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20423-0001

Re: **STB Ex Parte No. 582 (Sub-No. 1)**
Major Rail Consolidation Procedures

Dear Secretary Williams:

Enclosed for filing are an original and 25 copies of the **Comments of New Jersey Transit Corporation on Notice of Proposed Rulemaking**. Also enclosed is a 3.5-inch diskette containing the filing in WordPerfect 5.1.

Please feel free to contact me should any questions arise regarding this filing.

Respectfully submitted,

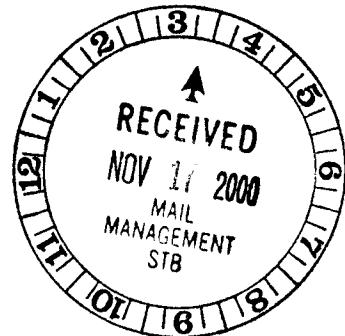


Edward J. Fishman
Attorney for New Jersey
Transit Corporation

Enclosures

cc: All Parties of Record

RECEIVED
Office of the Secretary
NOV 17 2000
Part of
Public Record

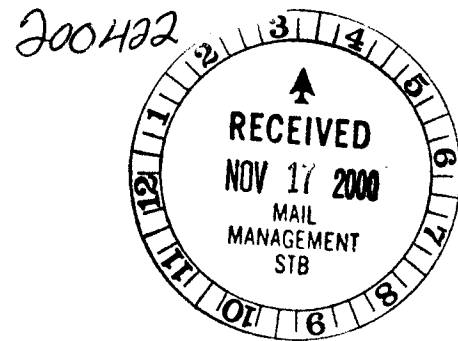


BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582
(SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

**COMMENTS OF NEW JERSEY TRANSIT CORPORATION
ON NOTICE OF PROPOSED RULEMAKING**



RECEIVED
Office of the Secretary

NOV 17 2000

Part of
Public Record

Kevin M. Sheys
Edward J. Fishman
Oppenheimer Wolff & Donnelly LLP
1350 Eye Street N.W.
Suite 200
Washington, D.C. 20005
(202) 312-8200

Counsel for New Jersey Transit Corporation

Dated: November 17, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582
(SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

**COMMENTS OF NEW JERSEY TRANSIT CORPORATION
ON NOTICE OF PROPOSED RULEMAKING**

New Jersey Transit Corporation ("NJ Transit") submits the following comments on the Surface Transportation Board's ("Board" or "STB") proposed modifications to its regulations at 49 CFR Part 1180, governing proposals for major rail consolidations. STB Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures, served October 3, 2000 (the "NPRM").

I. NJ Transit's Interest In This Proceeding

NJ Transit's commuter rail operating subsidiary, New Jersey Transit Rail Operations, Inc. ("NJTRO"), was created effective January 1, 1983 to take over and operate commuter rail services in New Jersey, New York and Pennsylvania previously operated by Consolidated Rail Corporation ("Conrail"). The State of New Jersey acquired its twelve (12) rail line segments pursuant to the provisions of the Regional Rail Reorganization Act of 1973 and the Railroad Revitalization and Regulatory Reform Act of 1976. These lines were purchased to preserve them as arteries of passenger and freight commerce under the operational and financial control of NJ Transit. As of the year 2000, NJ Transit owns 341 route miles (972 track miles) of railroad of which 300 route miles are shared with freight rail carriers. NJTRO dispatches over 408 route miles of railroad of which 366 route miles are shared with rail freight carriers. NJTRO dispatches approximately 27 freight trains daily for Norfolk Southern Railway Company,

Conrail, New York, Susquehanna & Western Railway, Morristown & Erie Railway and Southern Railroad Company of New Jersey over the 366 shared route miles.

In its main mission of providing rail passenger service, NJTRO provides approximately 200,000 daily commuter trips over 466 route miles (including the Northeast Corridor) in 610 daily revenue trains, using 695 passenger cars (of which about 300 are electric multiple units) and 104 locomotives. This service provides passenger rail access to the major terminals of Penn Station, New York; Hoboken, Newark and Atlantic City, New Jersey; and Philadelphia, Pennsylvania. NJTRO operates service on lines owned by NJ Transit as well as on lines owned and dispatched by Conrail within the North and South Jersey Shared Assets Area (Aldene to “NK” on the Lehigh Line and “Shore” to “Jersey” on the NEC-Atlantic City Line), Norfolk Southern Railway Company (Suffern to Port Jervis, NY on the Southern Tier Line), and the National Railroad Passenger Corporation (Trenton to Penn Station, NY on the NEC and 30th Street Station to “Shore” on the NEC-Atlantic City Line). Plans for future service call for operation over the lines or rights of way of CSX Transportation, Inc. (West Trenton to Bridgewater/Manville and Haverstraw, NY to North Bergen). Portions of two of the aforementioned twelve (12) line segments are operated by NJTRO under contract to Metro North Commuter Railroad Company (a subsidiary of the New York Metropolitan Transportation Authority) over lines owned by NJ Transit and NS. Service on those two line segments originates at Port Jervis and Spring Valley, New York and terminates in Hoboken, New Jersey.

NJ Transit has an aggressive capital program to preserve and expand passenger rail services in New Jersey and into adjacent areas of New York and Pennsylvania utilizing capital grants and investments from the State of New Jersey Trust Fund Authority, the Federal Transit Administration and New York’s Metropolitan Transportation Authority. Some of these services

will not be provided by traditional commuter rail operations but rather will involve services that share right-of-way or track with freight railroads pursuant to shared use agreements.

Since the beginning of rail operations in 1983, NJ Transit has invested just over \$4.6 billion in capital monies for rail service renewal, improvements and expansions. New Jersey voters have just approved the continuation of these capital programs by authorizing the dedication of future tax receipts to transportation capital programs. The continuation and expansion of these rail passenger services are vital for New Jersey to increase passenger rail ridership and thereby reduce the economic inefficiency and lost human productivity associated with automobile trip delays and the air quality problems caused by excessive numbers of automobile trips.

II. NJ Transit's Comments On The Proposed Rule

A. General Comments

In its comments on the Advanced Notice of Proposed Rulemaking (the "ANPRM"), NJ Transit urged the Board to require improved and more thorough analysis of the impacts of proposed mergers on existing and proposed passenger rail service and related projects. NJ Transit pointed out the fact that an efficient passenger rail system is vital to the economy of the region it serves. NJ Transit advocated extensive coordination between merging freight railroads and passenger railroads before and during the development of merger operating plans. NJ Transit also suggested that the Board require joint planning efforts on shared rail corridors as part of the service integration planning process in advance of a merger. Amtrak and several commuter railroads filed comments on the ANPRM that called for similar improvements in the Board's rail consolidation rules.

Overall, NJ Transit believes that the Board’s proposed rules would effectively address its expressed concerns regarding the potential adverse impact of future rail mergers on NJ Transit’s passenger rail operations.¹ Among other things, the Board’s recognition of passenger and commuter rail operations as an “essential service” (see Proposed § 1180.1(c)(2)(ii)), as that term has been used in past merger cases and as it is used in the proposed rule, should compel merger applicants to provide the Board and passenger rail operators with the information they need to fully evaluate the potential impacts of proposed mergers. In the proposed language for section 1180.1(d), the Board states its intention to use its broad conditioning authority to “mitigate or offset harm to the public interest.” Thus, the Board could and should use its conditioning authority to mitigate or offset potential harms to essential passenger rail service caused (or threatened) by an approved rail merger. There are, however, several things the Board should do to clarify the protections it would establish by the proposed rule.

B. Proposed Revisions To General Policy Statement

1. General Provision

In its discussion of the proposed language at § 1180.1(a), the Board recognizes that a “transaction involving two Class I rail carriers will affect the entire transportation system, including highways, waterways, ports and airports.” The Board should acknowledge explicitly in this provision, as it has done in other sections of the proposed rule, that such a consolidation would impact passenger rail services and operators. This can be accomplished by revising the

¹ Unless otherwise stated, the term “passenger rail” will be used herein to describe all types of passenger rail operations which use the general railroad network, including but not limited to intercity passenger rail operations, commuter rail operations, and light rail operations over shared use track. NJ Transit urges the Board to adopt a similarly expansive definition of the term “passenger” for purposes of its merger regulations.

second sentence of proposed § 1180.1(a) to include the following underlined text:

The Board recognizes that the railroad industry (including Class II and Class III carriers as well as passenger rail operators) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's passenger rail networks, highways, waterways, ports and airports.

2. Consolidation Criteria

In its narrative on the proposed language for § 1180.1(b), the Board indicates that the current rule recites the statutory public interest criteria from 49 U.S.C. § 11324. The proposed language “upgrades” the importance of competition in the Board’s evaluation of proposed rail mergers. In major mergers, the statute requires the Board to consider “the effect of the proposed transaction on the adequacy of transportation to the public.” 49 U.S.C. § 11324(b)(1). The proposed language for § 1180.1(b) refers only to “effective competition” among freight railroads and to “adequate service for shippers.” Although NJ Transit has no objection to the Board rewording § 1180.1(b) to emphasize the importance of competition, the rule should repeat the statutory requirement that the Board consider the effect of a proposed merger on the adequacy of transportation to the public as a whole. The Board also should clarify that, in determining whether a proposed merger is in the public interest, it will consider the impact on existing and proposed passenger rail service.

3. Public Interest Considerations – Essential Services

The Board recognizes that rail consolidations can threaten essential services and the reliability of the national railroad network. The largest railroads have reduced most or all of their excess physical capacity. NPRM at 10. Now there is a greater risk of harm to essential passenger rail services present in future major merger proposals because of the dramatic reduction of excess capacity. With reduced routing and rerouting options, there is less margin for error.

Moreover, any transaction involving two of the few remaining Class I rail carriers will affect the entire transportation system. NPRM at 11. This includes the extensive NJ Transit passenger rail network. For example, if the proponents of a future railroad merger tout the fact that the merger would reduce truck transportation in and around Philadelphia or Newark, but those trucks would be replaced by automobiles driven by former NJ Transit patrons who had grown tired of delayed passenger rail service, the net benefit to the public of reduced truck traffic would be offset or eliminated. NJ Transit is a major component of the transportation network in and around New Jersey and the Board's new merger rules must fully take into account the essential services provided by NJ Transit and other passenger railroads across the country.

The Board's proposed language in § 1180.1(c)(2)(ii) requires the Board to "ensure that essential freight, passenger, and commuter rail services are preserved." In its narrative on the proposed language for § 1180.1(c)(2), the Board explains that it has broadened its view of the harm to essential services criterion to include all aspects of the transportation infrastructure and not merely the freight rail network. NPRM at 15. NJ Transit commends the Board for recognizing that passenger/commuter rail service is an "essential service." The Board's broader view of essential services in a context of the entire transportation infrastructure is not only the best approach but the only approach. Any evaluation of the benefits of a merger weighed against its potential harms must include an evaluation of the entire transportation infrastructure. Otherwise, it is possible that predicted benefits of improved service, enhanced freight competition or economic efficiency would not adequately take into account merger-related harms to passenger rail operations and other essential services provided by the transportation infrastructure as a whole. In particular, the impacts of freight and passenger services in shared

territory must be looked at simultaneously. A passenger service should not need to be “fixed” as a result of changed freight operations.

In order to be consistent with its definition of essential services and its broadened focus on the potential harm to the entire transportation network, the STB should add the following underlined language to the last sentence of proposed § 1180.1(c)(2)(ii):

The Board will consider whether project shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers, passenger rail operators and ports) to sustain essential services.

The proposed language for § 1180.1(c)(2)(ii) states that “[a]n existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available.” Proposed § 1180.1(c)(2)(ii). The Board has exclusive and plenary authority over freight rail transportation and is well positioned to evaluate whether there is sufficient public need for freight service and adequate alternatives for that service. Thus, for example, the Board can determine whether an existing short line or regional railroad provides an essential service threatened by a proposed merger. However, the Board does not regulate commuter rail or rail transit service. 49 U.S.C. § 10501(c).² State departments of transportation, other state sovereign entities and the Federal Transit Administration have the primary role for determining the efficiency of, and public need for, particular commuter rail or rail transit services and the adequacy and availability of alternative passenger transportation. Thus, if a publicly-sponsored passenger rail operation is in service or if a publicly-sponsored passenger rail operator has a commitment with a freight railroad for the commencement of new or extended passenger rail

² The Board has jurisdiction under 49 U.S.C. §§ 11102 and 11103 over certain commuter railroads. 49 U.S.C. § 10501(c)(3)(B).

service, the Board should presume that there is sufficient public need for the service, that it is an essential service and that there are no adequate transportation alternatives.

C. Service Assurance Plans

Some merger-related harms to passenger rail service can arise from transitional service problems. NJ Transit supports the Board's intention to evaluate potential harms to essential services arising from transitional service problems. See Proposed § 1180.1(c)(2)(iii). Under proposed § 1180.1(h), the Board would require applicants to file a service assurance plan identifying precise steps to ensure continuation of adequate service during the critical transition period after consolidation. In its narrative on this proposed language, the Board indicates that the service assurance plan must include information regarding the coordination of the freight operations of the merging carriers and passenger operations. NPRM at 20.³

In proposed § 1180.10(b), the Board would require applicants to describe in their service assurance plans how they will continue to operate rail lines with Amtrak or commuter railroads in order to fulfill existing performance agreements. In addition, applicants would be required to establish operating protocols with rail passenger operators. Such protocols should address, among other things, the rules which will govern operations over joint freight/passenger lines. NJ Transit commends the Board for recognizing the need for coordination and effective communication between freight and passenger railroads and for inclusion of detailed steps to

³ In the spirit of such coordination, NJ Transit believes that the Service Council referenced in proposed § 1180.1(h)(3) should include passenger rail operators affected by any proposed merger and therefore recommends the addition of the following underlined language to that provision:

Also, we would envision the establishment of a Service Council made up of shippers, railroads, rail passenger operators and other interested parties to provide an ongoing forum for the discussion of implementation issues.

achieve these necessities in a service assurance plan. However, as currently worded, proposed § 1180.10(b) could be construed to apply only to freight or passenger operations over lines owned by the applicants themselves. The Board should explicitly require applicants to describe how they will coordinate post-merger freight operations over lines owned by passenger rail operators. The Board should also require applicants to address the potential impacts of post-merger freight operations on future passenger rail operations, particularly where the passenger rail operator has contract rights to expand its service over lines owned or shared by the applicants. Therefore, at a minimum, the applicants should be required to address the specific impacts of the proposed merger on passenger or transit projects which are in the Federal Transit Administration or New Jersey state review process and/or for which monies have been committed. In order to address these additional concerns, NJ Transit respectfully requests that the Board amend the first sentence of proposed § 1180.10(b) to include the following underlined language:

(b) Coordination of freight and passenger operations. If Amtrak or other passenger rail services are operated or intend to operate over the lines of the applicant carriers, or if the applicant carriers operate or intend to operate over lines owned by Amtrak or other passenger rail operators, applicants must describe definitively how they will continue to operate these lines to fulfill and abide by existing performance agreements, trackage rights or other contractual obligations related to those passenger rail services.

To be effective, a service assurance plan must cover all aspects of railroad operations. The proposed language in § 1180.10(e), regarding information technology systems, would work best if the Board employs sufficient resources (including outside consultants) to carefully review information submitted by applicants.

Service assurance plans, including the contingency plans for merger-related service disruptions, also must include (but not be limited to) specific information regarding planned

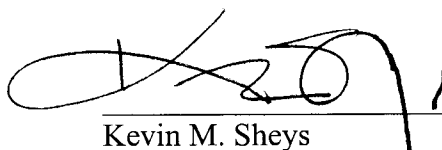
locations for temporary storage of trains whose crews have exceeded their hours of service and assurances that such storage will not adversely affect passenger rail service.

Meeting these requirements would by necessity mean that the merger applicants will meet and confer extensively with passenger rail operators in advance of the submission of an application. However, in several past mergers, railroads have not met with or even presented specific plans for meeting with passenger rail operators in advance of submission of applications and operators have been relegated to providing comments on final or nearly final operating plans during the merger review process. The Board's narrative accompanying the final revised merger rules should contain language requiring applicants to meet and confer with passenger railroads in advance of finalizing their operating plans.

III. Conclusion

NJ Transit commends the Board for recognizing the potential impact of major rail mergers on passenger rail operations and for requiring future merger applicants to describe how they will coordinate post-merger freight operations with passenger rail operations. However, as reflected in the foregoing comments, the Board needs to clarify the scope of these protections and impose additional requirements on the applicants in order to ensure that effective communication and coordination relating to the potential impact on existing and proposed passenger rail service takes place prior to the development of post-merger operating plans.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Sheys', is written over a horizontal line.

Kevin M. Sheys
Edward J. Fishman
Oppenheimer Wolff & Donnelly LLP
1350 Eye Street N.W.
Suite 200
Washington, D.C. 20005
(202) 312-8000

Counsel for New Jersey Transit Corporation

Dated: November 17, 2000